Supreme Court, U.S.
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CASE NO. 91-432

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RANDOLPH MOORE,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REX BELL
District Attorney

JAMES TUFTELAND*
Chief Deputy District Attorney

200 South Third Street
Las Vegas, Nevada 89155
Telephone: (702) 455-4711

Counsel for Respondent
Attorney of Record*

QUESTION PRESENTED

Whether, during the penalty phase of a bifurcated murder trial, the State of Nevada, after presenting evidence of four statutorily outlined aggravating circumstances, may also seek to shed light on the Petitioner's character by presenting evidence of the Petitioner's participation in Satan worshipping and satanic rituals.

RELATED CASES

Randolph Moore, the Petitioner, and codefendant Dale Edward Flanagan were jointly tried, convicted and sentenced to death for the murders of Carl and Colleen Gordon. In Flanagan v. State, 754 P.2d 836 (Nev. 1988) and Moore v. State, 754 P.2d 841 (Nev. 1988), the Nevada Supreme Court reversed the sentences and remanded the cases for a new penalty hearing. After again being sentenced to death, both Flanagan and Moore appealed and the Nevada Supreme Court, in a consolidated Opinion, affirmed the sentences. Flanagan v. State, 810 P.2d 759 (Nev. 1991).

In addition to Petitioner's Petition for Writ of Certiorari addressed herein, codefendant Flanagan has also filed a Petition for Writ of Certiorari alleging the same issues as Petitioner. The State of Nevada is responding separately to each petition.

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STATEMENT OF THE CASE

By way of an Information filed on February 25, 1985, the Petitioner and five codefendants were charged with two counts of Murder With Use of a Deadly Weapon and one count each of Conspiracy to Commit Murder, Robbery With Use of a Deadly Weapon, Conspiracy to Commit Robbery, Burglary and Conspiracy to Commit Burglary. The Petitioner plead not guilty to all seven counts against him and a jury trial was held beginning on September 26, 1985.

On October 11, 1985, the jury returned guilty verdicts on all seven counts against the Petitioner. Following the Petitioner's conviction, a penalty phase hearing was held and on October 17, 1985, the trial jury sentenced the Petitioner to death.

The Petitioner subsequently filed an appeal with the Nevada Supreme Court. On appeal, the Nevada Supreme Court, citing

the cumulative effect of the prosecutor's misconduct, reversed Petitioner's death sentence and remanded the case for a new penalty hearing.

On July 10, 1989, a second penalty hearing was commenced, following which the Petitioner was again sentenced to death. Subsequently, the Petitioner again appealed and on April 30, 1991, the Nevada Supreme Court affirmed Petitioner's death sentence.

STATEMENT OF FACTS

Carl and Colleen Gordon, fifty-eight and fifty-seven years old respectively, were the grandparents of Dale Edward Flanagan. In October of 1984, Flanagan, Petitioner Randolph Moore and four other trial codefendants met at Moore's house to discuss murdering the Gordons. Flanagan explained that he was the only beneficiary of the Gordon's will and he would inherit a considerable amount of money if they were killed. Flanagan stated that he would kill his grandmother if he had to, and Petitioner volunteered to kill Flanagan's grandfather.

The plan called for Mrs. Gordon to be beaten in the head and Mr. Gordon to be shot as he walked down the stairs. To cover up the brutal murders, the killers decided to make it look as though the house had been broken into in a robbery attempt.

On the evening of the murders, the Petitioner and his codefendants met at approximately 11:00 p.m., armed with a .22 caliber revolver, a regular .22 caliber rifle and a "sawed-off" .22 caliber rifle. They then proceeded to the Gordons' home and broke in through a window. Flanagan proceeded to his grandmother's room where he found her sitting up in bed. He grabbed her, pushed her down and shot her twice in the right side of the head and once in the left ear.

After apparently hearing his wife's screams and the gunshots, Mr. Gordon came down the stairs. Petitioner was waiting for him and subsequently shot and killed him. Mr. Gordon was shot initially in the chest, rib cage, abdomen, upper right arm, and back. Then, as Petitioner later stated, "The grandfather was squirming and I went up to him and shot him in the head."

Petitioner was convicted of two counts of Murder With Use of a Deadly Weapon and other charges including Conspiracy, Robbery and Burglary. After subsequently being sentenced to death at the conclusion of his penalty hearing, Petitioner appealed to the Nevada Supreme Court based, in part, on prosecutorial misconduct at the penalty hearing.

On May 18, 1988, the Nevada Supreme Court reversed Petitioner's death sentence based on five categories of misconduct. These five categories were reference to improbable rehabilitation and future killings; references to another convicted murderer; references to Petitioner's failure to testify and references regarding community standards. Although, at the penalty hearing, the State had made reference to the devil worshipping activities of the Petitioner and Flanagan, noticeably absent from the opinion was any evidence

that the Nevada Supreme Court deemed the references to Satan to be improper.

Upon reversal of the death sentence, the case was remanded for a new penalty hearing. The second penalty hearing commenced on July 10, 1989.

In its opening statements to the jury in the second penalty hearing, the State very clearly explained to the jury what must happen before the death penalty could be imposed. The State asserted that:

> There is a particular set of circumstances that need to come before you in a penalty hearing. There are things called aggravating circumstances which the State alleges in every death penalty case. We could allege one or more. We have alleged four in this particular case.
>
> Before you could ever impose the death penalty, you are going to have to find at least one of these and do some other things, too, . . . You will want . . . to make sure that I have presented sufficient evidence to prove to you beyond a reasonable doubt that those aggravating circumstances or one of them exist.

> The first one . . . is that the killings caused a risk of great harm to more than one person. . . .
>
> The second is that the murders occurred during the commission of a burglary. . . The third is that the murders occurred during the commission of a robbery. . . .
>
> And the last is that the purpose of the killing was to receive money. . .

The State went on to explain that the jury would also hear evidence about the character of the Petitioner. The State asserted that this character evidence would include reference to Petitioner's "use of devil worship," the fact that Petitioner was "in command" of a "coven" and that Petitioner, ". . . was known as white magic." which, ". . . has to do with the intimidation of people, to make people do things that they wouldn't otherwise want to do."

The State made it clear that the evidence of devil worship was only being offered as character evidence, not as an

aggravating circumstance. Outside the presence of the jury, the Petitioner had objected to the use of any such evidence to which the State responded:

> . . . as to the devil worship . . . This is a major part of two young men's lives that created not only their lifestyles but their manner of thinking and it identifies them in their character.

The court agreed with the State and ruled that the evidence was admissible, stating that:

> [Evidence of devil worship] does go to the character of the two defendants. . . . [i]n a penalty phase the character is the issue and . . . as [the State] has suggested [the devil worshipping] was clearly a substantial part of these men's lives at this time.

During the course of the penalty hearing, the State, in addition to proving the four aggravating circumstances alleged, produced testimony relating to the devil worshipping activities of the Petitioner. Tom Akers, one of the original six

defendants involved in the murders, testified that Flanagan had written the letter to Petitioner, after the murders, in which Flanagan stated, ". . . Satan is my God." Wayne Wittig testified that he had previously been a member of a "coven" led by Petitioner and Flanagan and that, "A coven is a gathering of people . . . to get the best out of life using black and white magic, sort of satanic." Wittig further testified that the coven did worship Satan. Furthermore, Angela Saldana testified that Petitioner had told her he was in a coven. Saldana also stated that she had personal knowledge that Petitioner and the others were involved in black magic or satanic activities. She went on to say that she had seen some of the paraphernalia at Petitioner's house.

In addition to the State's evidence, the Petitioner and Flanagan admitted to devil worshipping activities. In his

unsworn statement to the jury at the end of the defense's case, Flanagan said, ". . . I was involved in occult activities. . . . I will say that it was satanic worship." The Petitioner followed this by stating, ". . . I am not going to deny practice [sic] white witchcraft. I practiced it for quite a number of years."

During the closing arguments, the State again clearly explained to the jury how a death sentence could be imposed; as well as, expressly outlining the aggravating circumstances and various pieces of character evidence. The State stated that the jury must first find some aggravating circumstances, and find that they outweigh any mitigating evidence, before they could even be allowed to consider the death penalty.

Specifically, the State argued that:

> If you find one or more [aggravating circumstances], then you take it and you weigh it against whatever you find in mititgation . . . And if the

> aggravation to you is more important than the mitigation, then you are legally allowed to impose the death penalty. . . . That is the legal part of it.

The State then went through the aggravating circumstances, one by one, showing how they had been proven. The State asserted that:

> One, . . . This scheme, this conspiracy, caused a great risk of harm to more than one person and we know . . . more than one person . . . in fact died. . . . Two . . . The last jury convicted them of robbery of the Gordons . . . this killing was done during the commission of a robbery. . . . Three, the murder was committed in the commission of a burglary and they were convicted of burglary by the other jury. . . . Four, the murder . . . was committed . . . for the purpose of receiving money . . . This is the will. This is the inheritance . . . Clearly, all four aggravating circumstances exist.

After showing the existence of the aggravating circumstances and how they appeared to outweigh the mitigating evidence, the State asserted that the jury was, ". . . legally allowed to impose the death penalty,"

but the question for the jury was now, "Do you think it is appropriate . . ."

The State argued that after finding the existence of the aggravation, the jury would have to:

> . . . think about the nature of the crime . . . the character of the defendants . . . and you use your own subjective decision-making minds to determine whether or not the death penalty is appropriate in this particular case.

The State then went on to discuss why the death penalty was appropriate in this case. In addition to informing the jury that some purposes of the death penalty are to punish murders and to deter others from committing murders, the State asserted that the jury could consider the character of the Petitioner in deciding whether to sentence him to death.

With regard to Petitioner's character, the State brought out various incidents which were indicative of such character. The State asserted that Petitioner and his

codefendants liked, ". . . to carry weapons . . . guns and knives . . .;" that they had, ". . . the ability to premeditate and plan . . . to kill two people . . . and . . . the strength of character . . . to . . . do it," and that Petitioner was into, ". . . devil worship. . . . this coven, the evidence suggests, worshipped Satan." The State strengthened the relevance of this evidence by stating that Petitioner and Flanagan were still involved in Satan worshipping at the time of and after the killings. This was done, in part, by quoting from Flanagan's letter to Petitioner, after the murders, which stated, ". . . let the curse of Satan and all my powers of black magic take them to hell." and, "I will come back as Satan is my God."

After deliberations, the jury imposed a sentence of death on the Petitioner. The jury held that all four aggravating circumstances alleged by the State were in fact

proven beyond a reasonable doubt and that the only mitigating factor was Petitioner's lack of previous criminal record.

SUMMARY OF THE ARGUMENT

Petitioner's argument is based on the premise that the State of Nevada used evidence of Petitioner's devil worshipping activities as an aggravating circumstance in seeking the death penalty and since such evidence comprises a constitutionally protected activity, Petitioner's death sentence is invalid. This premise is incorrect and Petitioner's claims are without merit.

The State explained that the evidence was going to be offered as character evidence, not as an aggravating circumstance, the judge ruled that it was character evidence and the State introduced it as character evidence after outlining four

statutory aggravating circumstances. Because the sentencing jury must also assess the Defendant, as well as the crime, character evidence is admissible at penalty hearings and the State's use of the devil worship evidence in question was proper.

Furthermore, the jury issued a specific, as opposed to a general, verdict which outlined all four aggravating circumstances found. Because all four are valid, legally sufficient circumstances which can support a death sentence, Petitioner's sentence need not be vacated. Even if the use of the devil worship evidence is deemed unconstitutional, there is a clear explanation of what the jury relied on to sentence Petitioner and that evidence provides ample support for affirming the death sentence.

A R G U M E N T

THE INTRODUCTION, BY THE STATE OF NEVADA, OF EVIDENCE RELATING TO PETITIONER'S INVOLVEMENT IN SATAN WORSHIPPING DID NOT RENDER PETITIONER'S SENTENCE UNCONSTITUTIONAL, SINCE, IN ADDITION TO PRESENTING EVIDENCE OF THE AGGRAVATING CIRCUMSTANCES BEING ASSERTED, THE STATE IS ALLOWED TO PRESENT EVIDENCE OF PETITIONER'S CHARACTER AT PETITIONER'S PENALTY HEARING

Petitioner has alleged that he was prejudiced at his penalty hearing by the State's use of evidence relating to Petitioner's involvement in satanic worship. Petitioner argues that such evidence is impermissible when used as an aggravating circumstance in seeking the death penalty and therefore, its use as such was violative of Petitioner's constitutional rights regarding freedom of religion. The State of Nevada's actions were proper. Petitioner has not asserted a

claim for which this Court should grant certiorari.

To begin, it is important to note the difference between penalty hearings and guilt hearings in bifurcated trial systems. Penalty hearings involve considerations which are much different from those involved in a guilt trial. At a penalty hearing, the sentencing body must consider qualified evidence which will allow it to better assess the defendant and better determine the proper range of punishment.

When the death penalty is involved, this Court has repeatedly held that the State's sentencing scheme must protect against the arbitrary and capricious imposition of the death sentence. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). In short, the sentencing scheme must genuinely narrow the class of persons eligible for the death peanlty.

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983).

This Court has held that one way to insure that the sentencing scheme properly narrows the class of persons eligible for the death penalty is to have the state legislature produce statutory aggravating circumstances which are presented to the sentencing body at trial. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988). The existence or absence of these circumstances helps the sentencing body decide the propriety of the death penalty.

This is, however, not the only type of evidence which can be used by a sentencing body to determine whether the death penalty is appropriate. As stated earlier, the sentencer must also assess the particular defendant to properly determine punishment. As this Court has held, a sentencing court or jury must be permitted to consider any and all information that reasonably might

bear on the proper sentence for a particular defendant. Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217 (1984).

In line with this holding is Nevada Revised Statute (NRS) 175.552. This Nevada statute states, in part, that:

> In the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. (emphasis mine).

The Nevada Supreme Court has interpreted this statute to mean that the evidence admissible against a defendant at a penalty hearing is not limited to evidence of the nine aggravating circumstances outlined in NRS 200.033. Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983); Biondi v. State, 101 Nev. 252, 699 P.2d 1062 (1985). Rather, the Nevada Supreme Court has held that any relevant character evidence, which would be otherwise inadmissible at the guilt trial,

is admissible at the penalty hearing. Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988); Allen, supra; Biondi, supra.

This position is in accord with the decisions of other state courts of last resort and this Court also. For example, the Supreme Court of Colorado, in People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, Davis v. Colorado, ____ U.S. ____, 111 S.Ct. 662 (1991), held that a jury must be able to consider all facts and circumstances of the crime, the defendant's background and the defendant's character before assessing penalty. Additionally, this Court held in Zant, supra, that in a capital punishment scheme, it is important to provide for individualized determinations based, in part, on the character of the individual defendant. Moreover, in McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, rehearing denied, 482 U.S. 920, 107 S.Ct. 3199 (1987), this Court ruled that in

the making of a capital sentencing decision, one requirement is for, ". . . individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant."

The Nevada holdings are based on the rationale that a defendant's character is one factor that is relevant to a jury's determination of the appropriate sentence for a capital crime. Pellegrini, supra. Clearly, the State of Nevada considers a defendant's character to be highly relevant in assessing punishment and therefore allows for the introduction of such evidence in penalty hearings. Furthermore, the State of Nevada asserts that this approach is proper as evidenced by the similar holdings of this Court and other state supreme courts.

In the situation at bar, the State of Nevada introduced evidence of Petitioner's satanic worshipping activities at Petitioner's penalty hearing. This evidence was,

however, introduced purely as character evidence, completely distinct from the four aggravating circumstances asserted.

Before the trial started, the Petitioner objected to any use of the Satan worshipping evidence. The State responded that the evidence would be offered to show the character of the Petitioner. The State asserted that the evidence was relevant to Petitioner's character because it was indicative of his lifestyle and his way of thinking. Furthermore, the State argued that the letter Flanagan wrote to Petitioner showed that the satanic worshipping was still a part of their lives at the time of the murders.

The judge agreed with the State and held that the evidence was indicative of Petitioner's character and was clearly, ". . . a substantial part of [petitioner's life] at this time." As such, the evidence was held to be admissible during the

hearing. However, before the evidence was introduced, even before mention was made of it, the State, in its opening remarks, explained to the jury that the State was asserting four aggravating circumstances. The State went on to explain what those four circumstances were and how the jury must act with regard to them. The State then explained the separate area of character evidence and how to use it.

The State followed this same approach when it closed the hearing. In its closing argument, the State again outlined the four aggravating circumstances and showed how they had been proven. The State then explained the use of other evidence, like character evidence, and referred to various pieces of evidence tending to reflect on Petitioner's character. One of these pieces of evidence was Petitioner's penchant for devil worship.

The State asserts that the admission of

the devil worship evidence as character evidence was proper. It was clearly offered as character evidence, the judge expressly ruled it to be character evidence and the holdings of the Nevada Supreme Court and this Court allow for the introduction of character evidence at penalty hearings. The decision to admit particular evidence during the penalty phase hearing is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985), cert. denied, 479 U.S. 870, 107 S.Ct. 238 (1986). The State asserts the judge used proper discretion and this Court should decline to review the issues regarding the admission of this character evidence.

Furthermore, the introduction of the devil worship evidence did not violate any freedom of religion rights of the Petitioner. The Petitioner alleges that the use of

this evidence by the State was equivalent to using a constitutionally protected activity to obtain a death sentence. This allegation is also without merit.

As Petitioner correctly notes, this Court has consistently allowed individuals to adhere to any religious beliefs they want to under the protection of the First Amendment. See Texas v. Johnson, ____ U.S. ____, 109 S.Ct. 2533 (1989). As such, the State could not base an aggravating circumstance on a constitutionally protected activity. Zant, supra. Along these lines, the Petitioner argues that his worship of the devil was a religious belief and evidence of this belief was used as an aggravating circumstance to obtain the death penalty. This argument fails for two reasons.

To begin, the evidence, as previously discussed, was used as character evidence, not as an aggravating circumstance.

Therefore, Petitioner's reference to cases like McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322 (1978); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963); and Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680 (1961), is misplaced. These cases all dealt with states depriving individuals of their rights specifically because the individuals exercised certain religious beliefs. Here, Petitioner was not being punished or deprived of anything because he was a devil worshipper; rather, he was being punished as a murderer whose acts also met four statutory aggravating circumstances.

Additionally, this case involved a very specific, detailed verdict of death, as opposed to a general verdict. As such, Petitioner's heavy reliance on Zant, supra, is also misplaced.

Even if this Court were to find that the State's devil worship evidence was used as an aggravating circumstance, Zant v. Stephens,

would act to affirm the Petitioner's sentence, not render it invalid. In Zant, the defendant was appealing his death sentence, which was imposed after a sentencing jury found evidence of three aggravating circumstances. Zant, supra. In a subsequent case, the Georgia Supreme Court ruled that one of Georgia's statutory aggravating circumstances was unconstitutional. Id. Because the particular circumstance happened to be one of the three found against the defendant, he appealed his sentence. Id.

The defendant in Zant, supra, relied on Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931), in alleging that the invalidity of one of the statutory aggravating circumstances underlying the jury's sentencing verdict required that his entire death sentence be set aside. This Court, however, held that this allegation would only be correct if the jury had returned a

general verdict. Id. Where the jury returned a specific verdict identifying all aggravating circumstances found, as they did in Zant and in the present case, the sentence does not have to be vacated if there are other valid, legally sufficient aggravating circumstances identified which would support the death penalty. Id.

Assuming arguendo that the devil worship evidence could be viewed as a constitutionally protected activity, and that the State proffered said evidence as an aggravating circumstance, under Zant, supra, Petitioner's death sentence would still be valid. This is so because the sentencing jury specified that it had found four statutory aggravating circumstances, all valid and legally sufficient to support the death penalty alone, and that those four circumstances outweighed any mitigating evidence.

In sum, Petitioner's allegations are

both incorrect and without merit. The State's offer of the devil worship evidence was proper and Petitioner's sentence is valid. As such, this Court should decline to grant certiorari in this case.

CONCLUSION

The Petitioner has failed to demonstrate any conflicts between the holdings of this Court, the United States Courts of Appeals or any state courts of last resort; as well as, failing to allege any question of federal law that this Court should address. As such, the State of Nevada respectfully requests that this Court deny the Petitioner's request for a Writ of Certiorari.

Dated this 30th day of October, 1991.

Respectfully submitted,

JAMES TUFTELAND
Chief Deputy
Attorney for Respondent
REX BELL
District Attorney
200 South Third Street
Las Vegas, Nevada 89155

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA to the attorney of record listed below on this 7th day of November, 1991.

KEVIN M. KELLY, ESQUIRE*
302 East Carson Avenue
Suite 600
Las Vegas, Nevada 89101

DAVID M. SCHIECK, ESQUIRE
SCHIECK & DERKE
302 East Carson Avenue
Suite 918
Las Vegas, Nevada 89101

ATTORNEYS FOR PETITIONER
RANDOLPH MOORE
Attorney of Record*

Mary Robertson
Employee, Clark County
District Attorney's Office